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Supreme Court, U.S.
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No. 97-1104

In The

Supreme Court of the United States

October Term, 1997

YVETTE FARMER,

Petitioner,

vs.

UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA,

Respondent.

On Petition for Writ of Certiorari to the Nevada Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Petition for Writ of Certiorari present compelling reasons sufficient to justify this Court's exercise of its discretionary authority in favor of granting the Petition?

2. Does the Petition for Writ of Certiorari contain misstatements of fact or law that bear on what issues would properly be before the Court if Certiorari were granted?

3. Does Title VII of the Civil Rights Act of 1964, as amended, permit employers to take race into account as a plus factor where there has been a manifest imbalance in a traditionally segregated job category and the action does not trammel the rights of others?

4. Whether the issues relating to The Equal Pay Act of 1963 pertain to factual findings and, therefore, are not properly before this Court on a Petition for Writ of Certiorari?

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STATEMENT OF THE CASE

Petitioner, Yvette Farmer (hereinafter referred to as "Farmer"), seeks this Court's review by certiorari claiming that she has been denied employment in violation of Title VII of the Civil Rights Act. As will be set forth in this opposition, extraordinary review by certiorari is not warranted in this case for the opinion of the Nevada Supreme Court in *University and Community College System of Nevada v. Farmer*, 930 P.2d 730 (Nev. 1997), is consistent with this Court's opinions in *United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S. Ct. 2721, 61 L. Ed. 2d 480 (1979); and *Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987). Further, Farmer contends that the Court should grant her petition based upon the claim that the Nevada Supreme Court's opinion in *Farmer, supra,* is in direct conflict with the United States Court of Appeals' (Third Circuit) opinion in *Taxman v. Piscataway Township Board of Education*, 91 F.3d 1547 (3d Cir. 1996). This perceived conflict is based upon a misstatement of the facts and the law applicable thereto and, as will be shown, this case and *Taxman, supra*, are readily distinguishable.

University of Nevada, Reno is a university within the University and Community College System of Nevada (Respondent herein). Respondent will be hereinafter referred to as UNR. In 1989-1991, only 1% of UNR's academic faculty were black and 87% to 89% of its academic faculty were white. During this same time 25% to 27% of the full-time faculty were women. In order to rectify the racial imbalance, UNR had temporarily adopted an affirmative action policy, referred to as the minority bonus policy. The policy provided that for every minority hired in a department, a new employment position would be created. The purpose of the policy was to encourage UNR's departments to hire qualified minorities by rewarding

the departments with additional staff, to redress the conspicuous imbalance in minority staffing at UNR and to expose UNR's students to the experience of working with a racially mixed faculty. Petitioner's Appendix A-2 (hereinafter referred to as App.).

During the 1990-1991 academic year, Johnson Makoba (a black African male) applied for the advertised position of assistant professor in UNR's Sociology Department. Although Farmer (a white female) was one of three finalists for the position, Makoba ranked first among the three finalists. App. A-2. UNR, therefore, hired Makoba. Because Makoba was a minority, an additional employment position was created in the Sociology Department, and during the next academic year (1991-1992), Farmer was hired as an assistant professor to fill the newly created position. App. A-3.

Because there were so few black Ph.D.'s nationwide, and because UNR's officials knew Makoba was interviewing at other universities and were fearful of losing him to another university, UNR offered Makoba a higher salary than was advertised. Makoba started at $35,000 with a $5,000 increase upon completing his dissertation. The advertised starting salary range was $28,000 to $34,000. Farmer was offered a starting salary of $31,000 and a $2,000 raise after completion of her dissertation. Farmer's salary was slightly above the mean for new hires in the social sciences. App. A-2, A-3.

Based upon these facts, Farmer claimed that the decision to hire Makoba was discriminatory in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-(2)a. She also claimed that the pay differential was in violation of the Equal Pay Act, 29 U.S.C. § 206(d). It should be noted that having lost the Equal Pay Act claim, based upon a factual finding that the decision was for reasons unrelated to sex (29 U.S.C.

§ 206(d)(1)(iv)), Farmer now claims that the pay differential was in violation of Title VII. App. A-9 through A-11. *See also* Petitioner's Brief, p. i.

Nonetheless, the central issue is whether the decision to hire Makoba as opposed to Farmer was discriminatory in violation of Title VII of the Civil Rights Act. The salient facts which must be considered in determining this issue are: (1) Makoba was at least as qualified if not better qualified than Farmer for the position (App. A-2, A-3, A-7); (2) a manifest racial imbalance existed among the faculty at UNR (1% of the faculty were black and 87%-89% were white); (3) pursuant to a temporary affirmative action plan, upon Makoba's hire an additional position was created in the Sociology Department which resulted in the hiring of Farmer; and (4) no one lost their job as a result of the decision to hire Makoba.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI DOES NOT PRESENT COMPELLING REASONS SUFFICIENT TO JUSTIFY THIS COURT'S EXERCISE OF ITS DISCRETIONARY AUTHORITY IN FAVOR OF THE PETITIONER.

U.S. Sup. Ct. Rule 10 provides that review by a writ of certiorari is not a matter of right but a matter of the Court's discretion. The Rule also provides that a petition will only be granted for compelling reasons. The basis that Farmer cites in support of her claim that compelling reasons exist to support her petition is that the Nevada Supreme Court's opinion in this case is in direct conflict with the Third Circuit's opinion in *Taxman, supra.* Petitioner's Brief pp. 8-9.

U.S. Sup. Ct. Rule 10, (a)-(c) does generally provide that a writ of certiorari is proper where a state court of last resort has decided an important federal question in a way that conflicts with the decision of a United States court of appeals. However, as will be shown, the decision of the Nevada Supreme Court in this case is not in conflict with the opinion of the Third Circuit in *Taxman*. To the contrary, the two decisions can be harmonized as their supporting facts are readily distinguishable. In that the decisions are not conflicting, there is no compelling reason for granting a writ of certiorari and the petition should be denied.

II.

THE PETITION FOR WRIT OF CERTIORARI CONTAINS MISSTATEMENTS OF FACT AND LAW THAT BEAR ON WHAT ISSUES PROPERLY WOULD BE BEFORE THE COURT IF CERTIORARI WERE GRANTED.

U.S. Sup. Ct. Rule 15(2) requires that the brief in opposition include any perceived misstatements of fact or law in the petition which bear on the issues properly before the Court if certiorari were granted. UNR believes that the petition contains the following misstatements of fact and law which materially affect the issues before the Court.

Misstatements of fact and law:

1) Farmer states at page 4 of her petition as follows: "Although Farmer asserted on appeal that the record established she was more qualified for the position, the court below found that Farmer and Makoba 'were equal in most respects.' " This statement is taken out of context and is, therefore, somewhat misleading. The Nevada Supreme Court found that:

> Although Farmer contends that she was more qualified for Makoba's position, the search committee determined that Makoba's qualifications slightly exceeded Farmer's. The record, however, reveals that both candidates were equal in most respects.

App. A-7.

While this may be perceived to be splitting hairs, the evidence reflects that between the two Makoba was the most qualified. That being the case, the action is not even about Title VII or affirmative action, for quite simply the individual most qualified for the job was hired. If anything, UNR's affirmative action plan benefited Farmer. As Makoba was a minority, an additional faculty position was created in the Sociology Department and Farmer was hired!

2) At pages 19-20 of the petition, Farmer cites statistics from the *United States Bureau of the Census Population Paper Listing 49, Population of States by Race and Hispanic Origin*, April 1, 1990. This Paper purportedly indicates that in 1990 the population of the City of Reno was 2.8% black. Farmer goes on to argue that a faculty ratio of 1% black compared to 89% white is not a racial imbalance when the black population of the City of Reno is 2.8%.

The statistical evidence noted above was not part of the record below and is being added here for the first time. It should not be considered by the Court in this petition. Further, the focus of the Nevada Supreme Court was the statistical makeup of the faculty. A comparison of the number of black Ph.D.'s to the number of blacks who resided in the City of Reno was never the focus. As an aside, petitioner acknowledges that the percentage of black faculty at UNR (1%) is similar to the balance

of higher education throughout the United States. This is an acknowledgement of UNR's need to offer Makoba a slightly higher salary if UNR was going to be able to attract this candidate and that there was a manifest racial imbalance in this job category.

More importantly, in determining the validity of an affirmative action plan this Court has never compared the number of minorities at a particular place of employment with the number of minorities in the community. In determining whether a racial imbalance exists, the focus has always been upon the particular work force or craft in question. *See Weber, supra* and *Johnson, supra.* To suggest otherwise would be an invitation to discrimination.

3) Farmer argues throughout her brief that this Court has not addressed the issue of whether Title VII of the Civil Rights Act permits ". . . employers to take race into account for purposes other than remedying past discrimination." Petitioner's Brief, p. 1. Farmer's argument is that this Court has not decided whether racial preferences can be taken into consideration in order to promote racial diversity. Farmer argues that the Nevada Supreme Court has ruled in this case that it is permissible while in *Taxman,* the Third Circuit ruled that it is not. Thus, Farmer argues, the need for the Court's review in this case.

This is not the case, for as the Court noted in *Johnson,* an employer need not point to its own prior discrimination; it need only show an imbalance in traditionally segregated job categories.

> As Justice BLACKMUN's concurrence made clear, *Weber* held that an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an

> "arguable violation" on its part. *Id.*, at 212, 99 S.Ct., at 2731. Rather, it need point only to a "conspicuous . . . imbalance in traditionally segregated job categories."

Johnson v. Transp. Agency Santa Clara City, Cal., 480 U.S. at 630, 107 S. Ct. at 1451.

The issue in *Taxman* was very narrow.

> Specifically, we must decide whether Title VII permits an employer with a *racially balanced work force* to grant a non-remedial racial preference in order to promote "racial diversity."

Taxman v. Board of Educ. of Township of Piscataway, 91 F.3d at 1549-1550 (emphasis added).

Farmer has misstated the issue presented in *Taxman*. *Taxman*, as was the holding in *Weber* and *Johnson*, does not stand for the proposition that racial preferences may not be considered to remedy a "conspicuous imbalance" in the work force. Rather, *Taxman* stands for the proposition that racial preferences may not be considered in a decision to lay off an employee where there is a racially *balanced* work force. In this case, consistent with *Weber* and *Johnson*, the Nevada Supreme Court found that the policy was adopted in order to rectify the racial imbalance. App. A-2.

III.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PERMITS AN EMPLOYER TO TAKE RACE INTO ACCOUNT AS A PLUS FACTOR WHERE THERE HAS BEEN A MANIFEST IMBALANCE IN TRADITIONALLY SEGREGATED JOB CATEGORIES AND THE ACTION DOES NOT TRAMMEL THE RIGHTS OF OTHERS.

This is the issue that the Court should address in determining whether there is a compelling reason to grant Certiorari. It is submitted that there is no compelling reason for there is no conflict with the decisions entered in *Taxman* and the Nevada Supreme Court in this case. The facts of this case and the facts of *Taxman* are readily distinguishable. In other words, the facts in *Taxman* are beyond the Court's holdings in *Weber* and *Johnson*. The facts of this case are within the parameters of *Weber* and *Johnson*.

It should be noted that, as Farmer acknowledges, this case did not challenge UNR's actions on the basis of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Petitioner's Brief, page 13, n.5. Thus, review is limited to Title VII analysis.

In *Weber* and *Johnson* the Court held that an affirmative action plan is permissible where it is designed to mirror the goals of Title VII (to eliminate work force imbalances in traditionally segregated job categories) and does not unnecessarily trammel the interests of white employees. *See United Steelworkers v. Weber*, 443 U.S. at 208, 99 S. Ct. at 2730 and *Johnson v. Transp. Agency, Santa Clara City, Cal.*, 480 U.S. at 637-638.

In the case before the Court, the Nevada Supreme Court found that there was an imbalance in a traditionally segregated

job category. The full time faculty consisted of 1% black and 89% white. The lower court further found that the policy was put in place in an effort to rectify that imbalance. This clearly meets the first prong of *Weber* and *Johnson*. Further, the fact that Makoba's race was taken into account was only one "plus factor" and arguably Makoba was the most qualified of the two candidates.

As to the second prong, the minority bonus plan eliminated any harsh impact on whites. By hiring a minority an additional position was created which was filled by Farmer (a white). Thus, the plan did not "trammel" the interests of others. Rather, the plan served to eliminate any adverse impact upon non-minorities. It must be stressed that no one lost their job and any adverse impact created by the plan was minimal.

Thus, the facts of this case satisfy the two pronged test contained in *Weber* and *Johnson* and do not present any conflict with the holdings of this Court. The decision in *Taxman*, on the other hand, is not in conflict with the decision of the lower court in this case, for *Taxman* fails to satisfy either element of the *Weber* test.

In *Taxman*, the Third Circuit merely found that the Board of Education's decision to lay off a white teacher over a black teacher violated Title VII because the decision did not satisfy either element of the *Weber* test.

The school board was faced with layoffs. The Board decided to release a white teacher over a black teacher. Both teachers were equally qualified and held equal seniority. The stated reason for releasing the white teacher was for racial diversity. However, the Board acknowledged that the school's work force was racially balanced.

Under these facts, the Third Circuit found that the Board's decision could not satisfy the first element of *Weber*. The decision was not intended to remedy any prior discrimination and the Board acknowledged that blacks were not under-represented in the teaching work force in general or at Piscataway High School in particular. *Taxman, supra*, at 1563.

> . . . we are constrained to hold, as did the district court, that inasmuch as "the Board does not even attempt to show that its . . . affirmative action plan was adopted to remedy past discrimination or as the result of a manifest imbalance in the employment of minorities," 832 F.Supp. at 845, the Board has failed to satisfy the first prong of the *Weber* test.

Taxman, supra at 1563.

The Third Circuit Court of Appeals also held that the action failed to satisfy the second prong of the *Weber* test, for the Board's decision "unnecessarily trammel[s]" the interests of non-minorities. In this regard the court stated:

> . . . we are convinced that the harm imposed upon a non-minority employee by the loss of his or her job is so substantial and the cost so severe that the Board's goal of racial diversity, even if legitimate under Title VII, may not be pursued in this particular fashion.
>
> * * *
>
> Accordingly, we conclude that under the second prong of the *Weber* test, the Board's affirmative action policy violates Title VII.

Taxman, supra at 1564-1565.

Contrary to what Farmer would have you believe, the authorities cited in the petition are not in conflict and create no ill founded propositions of law. In *Taxman*, the Third Circuit holding was consistent with this Court's holdings in *Weber* and *Johnson*, for the facts did not satisfy the *Weber* test. In this case, the lower court correctly found that the actions of UNR were consistent with the decisions of this Court, for the minority bonus policy was implemented to rectify a conspicuous imbalance in the work force and the policy did not trammel the interests of a non-minority, for the policy created an additional position which was filled by a qualified non-minority.

In sum, the two decisions are not in conflict. The cases are simply distinguishable.

IV.

THE ISSUES RELATING TO THE EQUAL PAY ACT OF 1963 PERTAIN TO FACTUAL FINDINGS AND, THEREFORE, ARE NOT PROPERLY BEFORE THIS COURT ON A PETITION FOR WRIT OF CERTIORARI.

Farmer claims for the first time that the starting pay differential is in violation of Title VII. This should not be considered at this point. At all times prior to this, Farmer's argument had been that the pay differential was in violation of the Equal Pay Act, 29 U.S.C. § 206(d). The lower court ruled against Farmer, finding that the pay differential was based upon a factor other than sex, i.e., market factors. App. A-9 through A-11.

A petition for writ of certiorari is not a proper vehicle to review factual findings.

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual

> findings or the misapplication of a properly stated rule of law.

U.S. Sup. Ct. Rule 10.

The Court should not review the lower court's factual findings regarding Farmer's Equal Pay Act claim. If the Court is to consider the pay differential issue as a possible violation of Title VII, it must be stressed that this was not raised before nor considered by the lower court. In any event, the modest starting pay differential did not "unnecessarily trammel" the interests of Farmer.

CONCLUSION

The decisions raised by petitioner are not in conflict. For the reasons shown, the two cases are readily distinguishable and both were decided in harmony with the Court's opinions in *Weber* and *Johnson*. There is no compelling reason for the Court to grant the petition for writ of certiorari. Accordingly, respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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